

NUMBER 89-439

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Supreme Court, U.S.

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In The  
Supreme Court Of The United States

OCTOBER TERM, 1989

DAVIS OIL COMPANY, ET AL,  
Petitioners

versus

WILLIAM P. MILLS, III, ET AL,  
Respondents

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF  
FIRST NATIONAL BANK OF LAFAYETTE

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**SUPREME COURT OF THE UNITED STATES**  
**OCTOBER TERM, 1989**

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WILLIAM P. MILLS, III, ET AL.,  
Respondents

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**CERTIFICATE OF SERVICE**

I, Charles R. Minyard, of the law firm of Mangham, Hardy, Rolfs and Abadie, counsel of record for First National Bank of Lafayette, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 6th day of October, 1989, I served three copies of the Brief in Opposition on behalf of First National Bank of Lafayette to each of the following named attorneys representing the indicated parties to this litigation:

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**CHARLES R. MINYARD**

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## **LIST OF PARTIES**

In accordance with Rule 34.1(b) of the Rules of the Supreme Court of the United States, the following list of parties is submitted because the caption of the case in this Court does not contain the names of all the parties:

### **PETITIONERS** (plaintiffs in the District Court)

Davis Oil Company  
Exxon Corporation  
Allen E. Paulson  
Vale & Company  
Saturn Energy Company

### **RESPONDENTS** (defendants in the District Court)

William P. Mills, III  
John L. Robertson  
Brenda Sue Harmon Robertson  
Orel Bridges, Jr.  
Ethyl Sue Hoffpauir Bridges  
First National Bank of Lafayette  
Kenneth D. Upton  
William J. Guste, Jr., as Attorney General of the  
State of Louisiana  
Donald Breaux, as Sheriff of Lafayette Parish, Louisiana

## **IDENTIFICATION OF PARENTS, SUBSIDIARIES AND AFFILIATES**

This brief in opposition is filed on behalf of a corporate entity, First National Bank of Lafayette. This statement of its parent companies, subsidiaries and affiliates is submitted in compliance with Rule 28.1, Supreme Court Rules.

First National Bank of Lafayette is owned by a holding company, First Commerce Corporation. First Commerce Corporation also owns First National Bank of Commerce in New Orleans, City National Bank in Baton Rouge, Rapides Bank in Alexandria, and First National Bank of Lake Charles.

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**versus**

**WILLIAM P. MILLS, III, ET AL**

**Respondents**

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**BRIEF IN OPPOSITION ON BEHALF OF  
FIRST NATIONAL BANK OF LAFAYETTE**

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The Respondent, First National Bank of Lafayette, respectfully requests that this Honorable Court deny the petition for a writ of certiorari seeking review of the opinion of the Fifth Circuit Court of Appeals in this case. The opinion of the Fifth Circuit is reported at 873 F.2d 774 (5th Cir. 1989). That opinion affirmed the decision of the United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division, which is set forth at Appendix D to the Petition for Certiorari.

**SUMMARY OF ARGUMENT**

The Fifth Circuit did not waiver from the standards for notice

of pending state action required by the Due Process Clause of the Fourteenth Amendment. The minimum constitutional requisites for such notice, as set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) and *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) must be determined on the basis of the circumstances presented in the individual case and, thus, can only be determined on a case by case basis.

In this case, the court of appeals determined from the factual circumstances that the identity of Davis Oil Company, as a party with a mineral interest which would be affected by the mortgage foreclosure process, was not reasonably ascertainable and, hence, actual notice of the pending action was not mandated by the Due Process Clause of the Fourteenth Amendment. This case turns upon the facts. Further review of those facts is not warranted.

## ARGUMENT

### THE OPINION OF THE FIFTH CIRCUIT IS IN ACCORD WITH THE DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS

This case concerns the standard for notice of state action adversely affecting property interests established in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 at 314, 70 S.Ct. 652 at 657, 94 L.Ed. 865 (1950):

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice, reasonably calculated, under all the circumstances, to apprise interested parties of the pen-

dency of the action and afford them an opportunity to present their objections."

In *Mennonite Board of Missions v. Adams*, 462 U.S. 791 at 800, 103 S.Ct. 2706 at 2712, 77 L.Ed.2d 180 (1983) this Court held:

"Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable."

In *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), this Court noted its adherence to the principles established in *Mullane, supra*, pointing out that the focus is on the reasonableness of the balancing of the state interest and the constitutionally protected individual interest. It also reaffirmed the notion that the reasonableness of any particular manner of according notice must be determined in light of the particular circumstances.

In the instant case, the district court determined that notice by publication was a reasonable means of providing notice to the Petitioner, Davis Oil Company, because its identity as an owner of a mineral interest which would be affected by the seizure and sale was not reasonably ascertainable. After thorough review, the court of appeals affirmed.

The Petitioners seek this Court's review of that determination, a determination which is dependent upon the factual findings regarding whether Petitioners' identities were reasonably ascertainable. The courts below carefully analyzed the factual circumstances and were in accord regarding the final determination. The facts of this case do not

merit further review by this Court.

The decision of the Court of Appeals does not conflict with principles espoused in *Mennonite*, *Mullane*, or *Pope*, but, to the contrary, it is fully in accord therewith and properly applies the standards set forth therein. Nor does the decision of the court of appeals conflict with other decisions rendered by that court, or other courts of appeals, as is incorrectly asserted by the Petitioners.

While Petitioners maintain the decision by the Fifth Circuit conflicts with its subsequent decision in *Small Engine Shop, Inc. v. Cascio*, 878 F.2d 883 (5th Cir. 1989), the two decisions are harmonious. In fact, the opinion of the court of appeals in the instant case is cited favorably in the *Small Engine Shop* opinion.

In *Small Engine Shop, supra*, the court of appeals held that the failure of the owner of property to request notice of seizure under La. R.S. 13:3886 did not, in and of itself, relieve the state actor of the due process requirement of reasonable efforts to provide actual notification.

In the instant case, the district court and the court of appeals found, under the facts and circumstances of the case, that Davis Oil Company's identity as an owner of a mineral interest affecting the subject property was not reasonably ascertainable and held that constitutional due process did not mandate actual notice to the Petitioners of the impending seizure and sale of the property in the execution of the mortgages. The court found that a requirement that a foreclosing creditor conduct a search in the public records of conveyances through a "potentially complex maze of leases and assignments" (873 F.2d at 790) in order to identify persons who may own mineral interests which could be affected by the foreclosure would be unduly burdensome. The court further found that where the Petitioners did not seek subordination of the mortgage as is the customary practice in the industry, it was not unreasonable to expect that they would take the minimal step of

requesting notice of seizure as provided in La. R.S. 13:3886.

The court of appeals' decision did not rely solely on the Petitioners' failure to request notice, but it was a factor in determining the reasonableness of requiring a full search of the conveyance records. In fact, the court of appeals specifically rejected the notion that failure to request notice under La. R.S. 13:3886 constitutes a waiver of due process rights to notice. See 873 F.2d at 787.

*Verba v. Ohio Casualty Insurance Co.*, 851 F.2d 811 (6th Cir. 1988) held that constructive notice of a pending tax sale was not sufficient to satisfy the due process requirements of the Fifth Amendment where the identity and address of a specific judgment lienholder was a matter of public record. The opinion of the Sixth Circuit in *Verba* does not necessarily conflict with the Fifth Circuit's opinion in the instant matter. The underlying circumstances or facts may not be the same in the two cases. The *Verba* opinion does not address the specifics regarding the manner in which the public records in which the lienholder's certificate of judgment is recorded are maintained or indexed. It also failed to address the characteristics of the property interest involved.

In short, in *Verba*, the issue was not whether the interest of Ohio Casualty was "reasonably ascertainable", but whether notice of a tax sale by publication and posting to an entity whose interest was reasonably ascertainable was adequate.

On the other hand, in analyzing the requirements of Fourteenth Amendment due process in this case, the issue before the Fifth Circuit was whether the factual circumstances made the interest of Davis Oil Company reasonably ascertainable so as to make notice by publication insufficient. It noted that because a piece of property can be subject to one or more mineral leases and interests in those leases can be divided and subsequently assigned to different persons (as in this case) the trail

of mineral interests in a single piece of property can "resemble a rather large tree with several limbs and innumerable branches" (873 F.2d at 789), thus emphasizing that a search for persons who might have an interest, regardless of its validity, can be extremely cumbersome. The Fifth Circuit was called upon to determine the reasonableness of a search for mineral interests which could be extremely burdensome. As the court below stated "... the reasonableness of constructive notice in a particular case may turn on the nature of the property interest at stake and the relative ease or difficulty of identifying such interest holders from the land records and also on the existence of alternative means of insuring receipt of notice." 873 F.2d at 790.

The Fifth Circuit was called upon to determine whether First National Bank of Lafayette, in enforcing its security interest in the subject property, could be reasonably required to ascertain the identities of owners of mineral interests in the subject property. That determination was made upon the facts of the case, which obviously, are not the facts in *Verba*.

#### THIS CASE DOES NOT MERIT FURTHER REVIEW OF THE FACTS

As mentioned above, although Petitioners assert that the court of appeals' decision conflicts with the established jurisprudence regarding due process protection, a review of their Petition reveals that their complaint centers not on the Fifth Circuit's interpretation or application of the standards set forth in that jurisprudence, but instead focuses upon the factual findings of the court below. They argue that under the circumstances, Davis Oil Company's identity as an interested party was reasonably ascertainable and consequently actual notice was required.

However, the Fifth Circuit, like the District Court, took a different view of the factual circumstances than do the Petitioners. It found that due to the nature of mineral interests, the complexity of the



public records, the failure of Davis Oil Company to seek subordination of the mortgage and the non-existence of any requests for notice of seizure as permitted by La. R.S. 13:3886, any requirement that a search of the conveyance records be made in an effort to identify owners of mineral interests would be unreasonably burdensome. Consequently, the court held that Davis Oil Company's identity as an interested party was *not* reasonably ascertainable.

### CONCLUSION

None of the factors mitigating in favor of an exercise of this Court's jurisdiction are presented in this petition. The Fifth Circuit has not derogated from principles established by this Court, but has been specifically guided by them. There is no conflict between the decision of the Fifth Circuit in this case and other decisions by it, or those of other circuits. The Petitioners herein actually seek a third review of the facts of the case which present questions unique to Louisiana land records, Louisiana mineral interests, Louisiana foreclosure proceedings, and the specific circumstances of the parties and proceedings below. Respondent submits that such review is not warranted.

Respectfully submitted,

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